

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of

**CERTAIN AMMONIUM
OCTAMOLYBDATE ISOMERS**

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) **Inv. No. 337-TA-477**
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**NOTICE OF COMMISSION DETERMINATION TO REVIEW A
FINAL INITIAL DETERMINATION FINDING NO VIOLATION OF
SECTION 337; SCHEDULE FOR FILING WRITTEN SUBMISSIONS ON
THE ISSUES UNDER REVIEW AND ON REMEDY, THE
PUBLIC INTEREST, AND BONDING**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in its entirety the final initial determination (ID) issued by the presiding administrative law judge (ALJ) on May 15, 2003, finding no violation of section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Wayne Herrington, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3090. Copies of the ALJ's ID and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on August 20, 2002, based on a complaint filed by Climax Molybdenum Company ("Climax") against one respondent, Molychem LLC. (Molychem). 67 *Fed. Reg.* 53966. In that complaint, as supplemented, Climax alleged violations of section 337 in the importation into the United States, sale for importation, and/or sale within the United States after importation of certain ammonium octamolybdate isomers by reason of infringement of claim 1 of Climax's U.S. Patent No. 5,985,236. Subsequently, the complaint and notice of investigation were amended to add four additional respondents to the investigation: Anhui Wonder Trade Co., Ltd.; Pudong Trans USA, Inc. (Pudong); John S. Conner, Inc. (Conner); and Chem-Met International, Inc. One of these respondents, Conner, was eventually terminated from the investigation as the result of a settlement agreement.

On May 15, 2003, the ALJ issued his final ID on violation and his recommended determination on remedy and bonding. The ALJ found no violation of section 337 because he concluded that claim 1 of the '236 patent was invalid on the basis of an on-sale bar under 35 U.S.C. § 102(b). In his ID, the ALJ noted that the '236 patent is currently the subject of a reissue proceeding in the United States Patent and Trademark Office (PTO). Complainant Climax filed a petition for review on May 27, 2003. On May 30 and June 3, 2003, respectively, respondent Molychem and the Commission investigative attorney each filed a response to the petition for review. On June 10, 2003, Climax filed a motion for leave to file a reply to the response of the Commission investigative attorney, including its proposed reply. On June 11, 2003, Molychem filed a motion to strike Climax's motion for leave.

Having examined the record in this investigation, including the ALJ's final ID, the petition for review, and the responses thereto, the Commission has determined to review the final ID in its entirety. The Commission has also determined to deny Climax's request for oral argument. In addition, the Commission has determined to deny Climax's motion for leave to file a reply and to deny Molychem's motion to strike without prejudice to renewing any pertinent arguments in their written submissions in the course of the Commission's review of the final ID.

On review, the Commission requests briefing based on the evidentiary record. While the Commission has determined to review the final ID in its entirety, it is particularly interested in briefing on the issues of personal jurisdiction over respondent Pudong, claim construction, invalidity of claim 1 of the '236 patent for anticipation by the Tytko article, and unenforceability of the '236 patent for inequitable conduct, and especially in receiving answers to the following questions:

1. What is the meaning of the term "octamolybdate" in claim 1 of the '236 patent? In particular, the Commission wishes the parties to address whether the term refers to a single polyanion containing eight molybdenum and twenty-six oxygen atoms.

2. Whether (a) the Raman spectrum shown in Figure 1(f) of the Tytko article (second from the top) falls within the Raman spectrum set out in Claim 1 of the '236 patent, and (b) whether the Tytko article contains sufficient enabling disclosure with respect to the composition represented by that spectrum so as to be available as prior art.
3. The legal foundation and record support for the existence or non-existence of the specific offer for sale or sale found by the ALJ in his final ID in connection with his finding of the existence of an on-sale bar.

The Commission has also determined to order complainant Climax to file and serve with its main review brief a copy of the file for the reissue application for the '236 patent which is currently pending in the PTO, as well as the files of any other proceedings in the PTO relating to the '236 patent, the reissue application, or the original application for the '236 patent. Complainant Climax is also ordered to file and serve any additions to such files as they are made in the PTO.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *In the Matter of Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the President has 60 days to approve or disapprove the Commission's action. During this period, the subject articles would be entitled to enter the United States under a bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues under review. The submissions should be concise and thoroughly referenced to the record in this investigation. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the May 15, 2003, recommended determination by the ALJ on remedy and bonding. Complainant and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. The written submissions and proposed remedial orders must be filed no later than close of business on July 14, 2003. Reply submissions must be filed no later than the close of business on July 21, 2003. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document and 14 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* section 201.6 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 201.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.43-.44 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.43-.44).

By order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: June 30, 2003